

C A M P A I G N F O R ACCOUNTABILITY

August 22, 2017

By email: Hugh.gilmore@cms.hhs.gov

Hugh Gilmore
Freedom of Information Officer
Centers for Medicare & Medicaid Services
North Building, Room N2-20-06
7500 Security Boulevard
Baltimore, MD 21244

Re: Freedom of Information Act Request

Dear Mr. Gilmore:

Campaign for Accountability (“CfA”) makes this request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552, *et seq.*, and Department of Health and Human Services (“HHS”) implementing regulations, 45 C.F.R. Part 5.

Specifically, CfA requests that the Centers for Medicare and Medicaid Services (“CMS”) produce the following within 20 business days:

1. Copies of all communications, electronic or otherwise, to, from, or between any employee of CMS and any employee of the following offices within the Government of Texas: the Office of the Governor, the Office of the Attorney General, and/or the Office of the Lieutenant Governor, regarding the State of Texas’s application for a new waiver for the Healthy Texas Women Section 1115 Demonstration Waiver.¹
2. Copies of all communications, electronic or otherwise, to, from, or between any employee of CMS and any member of the Texas State Legislature, or any member of their staffs, regarding the State of Texas’s application for a new waiver for the Healthy Texas Women Section 1115 Demonstration Waiver.
3. Copies of all communications, electronic or otherwise, to, from, or between any employee of CMS and any Member of Congress, or any member of their staffs, regarding the State of Texas’s application for a new waiver for the Healthy Texas Women Section 1115 Demonstration Waiver.
4. Copies of all communications, electronic or otherwise, to, from, or between any employee of CMS regarding The Heidi Group, a Texas-based nonprofit, its executive director, Carol Everett, and/or the name under which it sometimes operates, the Women’s Wellness Coalition.²

¹ <https://hhs.texas.gov/laws-regulations/policies-rules/waivers/healthy-texas-women-1115-waiver>.

² <http://heidigroup.org/>.

Please provide all responsive records from January 20, 2017, to the date the search is conducted.

By way of background, on May 12, 2017, Texas Health and Human Services announced its intention to request federal funding for a state program that provides family planning services for low-income women but excludes Planned Parenthood.³ On June 30, 2017, Texas submitted its formal waiver application to CMS.⁴

Previously, HHS officials upheld a federal law requiring states to allow Medicaid beneficiaries to choose “any willing provider” and denied Texas’s earlier request.⁵ The requested records will allow the public to determine whether state officials have attempted to influence HHS’s consideration of Texas’s application.

The Heidi Group is a nonprofit in Texas that received a \$1.6 million contract through the state program set up to replace the federal Medicaid funding.⁶ An *Associated Press* investigation found the Heidi Group had largely failed to deliver any of the outcomes it promised in its contract.⁷ The requested documents will allow the public to understand whether HHS is considering an application for a program that has awarded funding to a nonprofit that appears to have failed to abide by its contract.

In addition to the records requested above, please provide records reflecting the processing of this request, including any tracking sheets; records sufficient to identify search terms used, and locations and custodians searched. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

CfA seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to

³ Abby Goodnough, *Texas Seeks Medicaid Money It Gave Up Over Planned Parenthood Ban*, *The New York Times*, May 15, 2017, available at <https://www.nytimes.com/2017/05/15/health/texas-medicaid-planned-parenthood.html>.

⁴ <https://hhs.texas.gov/laws-regulations/policies-rules/waivers/healthy-texas-women-1115-waiver>.

⁵ Goodnough, *The New York Times*, May 15, 2017.

⁶ Paul Weber, *Get by Without Planned Parenthood? One Texas Effort Stumbles*, *Associated Press*, March 14, 2017, available at <https://apnews.com/f7645d59944d47228f2eb195a35a19a4>.

⁷ *Id.*

the Federal Records Act and FOIA.⁸ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; CfA has a right to access those files even if they have not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.⁹

In addition, please note that in conducting a “reasonable search” as required by law, CMS must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered CMS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.¹⁰ Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but CMS’s archiving tools would capture that email under Capstone. Accordingly, CfA insists that CMS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. CfA is available to work with CMS to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹¹ If it is your position that any portion of the requested records is exempt from disclosure, CfA requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹² Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of

⁸ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149—150 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—956 (D.C. Cir. 2016).

⁹ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, ___, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹⁰ Presidential Memorandum – Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), *available at* <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹¹ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

¹² *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

disclosing the sought-after information.”¹³ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁴

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁵ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, CfA welcomes an opportunity to discuss its request with CMS before you undertake your search or incur search or duplication costs. By working together at the outset, CfA and CMS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format via email at dstevens@campaignforaccountability.org. Alternatively, our mailing address is Campaign for Accountability, 611 Pennsylvania Ave S.E., #337, Washington D.C. 20003. If it will accelerate the release, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, CfA requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹⁶

CfA requests a waiver of fees because disclosure of the requested information is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁷ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

¹³ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphasis in original).

¹⁴ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁵ *Mead Data Central*, 566 F.2d at 261.

¹⁶ *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁷ 45 C.F.R. § 5.54(a).

Beginning in 2013, the State of Texas prohibited Planned Parenthood from receiving Medicaid funding.¹⁸ To replace the federal program, the State Legislature created a state-funded alternative.¹⁹ The plan failed to completely off-set Medicaid, though, and 82 clinics closed or eliminated family planning services.²⁰ Subsequently, Texas's maternal mortality rate doubled, and teen abortions and teen pregnancies increased.²¹ Additionally, tens of thousands of women appear to have lost access to health care services.²²

Additionally, the Medicaid replacement program allowed the state to award a \$1.6 million contract to the Heidi Group to help small and rural clinics serve additional patients. Eight months after the group received the contract, however, almost none of the services it promised had been provided.²³ The requested documents will help the public determine whether and to what extent outside interests are pressuring HHS to advance a policy that appears to waste money and hurt low-income women.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) organization, CfA does not have a commercial purpose and the release of the information requested is not in CfA's financial interest. CfA is committed to protecting the public's right to be aware of the activities of government officials and to ensuring the integrity of those officials. CfA uses a combination of research, litigation, and advocacy to advance its mission. CfA will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CfA will disseminate any documents it acquires from this request to the public through its website, www.campaignforaccountability.org.

Accordingly, CfA qualifies for a fee waiver.

¹⁸ Excluding Planned Parenthood Has Been Terrible for Texas Women, *Center for Public Policy Priorities*, August 2017, available at https://forabettertexas.org/images/HW_2017_08_PlannedParenthoodExclusion.pdf.

¹⁹ Goodnough, *The New York Times*, May 15, 2017.

²⁰ *Center for Public Policy Priorities*, Aug. 2017.

²¹ Mary Tuma, Texas Maternal Mortality Rate Soars, *Austin Chronicle*, September 9, 2016, available at <https://www.austinchronicle.com/news/2016-09-09/texas-maternal-mortality-rate-soars/>; Mary Tuma, What Happens When Texas Blocks Planned Parenthood? Abortions Rise, *Austin Chronicle*, July 12, 2017, available at <https://www.austinchronicle.com/daily/news/2017-07-12/what-happens-when-texas-blocks-planned-parenthood-abortion-rise/>.

²² *Center for Public Policy Priorities*, Aug. 2017.

²³ Weber, *Associated Press*, Mar. 14, 2017.

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Conclusion

CfA looks forward to working with CMS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact me at 202-780-5750. Further, if CfA's request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you for your assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan E Stevens", with a long horizontal flourish extending to the right.

Daniel Stevens
Executive Director